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**UNITED STATES DISTRICT COURT**  
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
**SAN FRANCISCO DIVISION**

DEPARTMENT OF FAIR EMPLOYMENT  
AND HOUSING, an agency of the State of  
California,

Plaintiff, and

STEVEN J. CARAUDDO

Plaintiff-Intervenor

v.

LUCENT TECHNOLOGIES INC., and;  
DOES 1 through 20,

Defendants.

CASE NO.: 3:07-cv-03747-PJH

**DEFENDANT LUCENT  
TECHNOLOGIES' REPLY BRIEF IN  
SUPPORT OF PARTIAL MOTION TO  
DISMISS**

**[FRCP 12(b) (6)]**

Hearing Date: April 16, 2008

Time: 9:00 a.m.

Courtroom: 3, 17th Floor

Judge Phyllis J. Hamilton

**I. INTRODUCTION**

Intervenor Plaintiff Steven Carauddo ("Carauddo") presents two arguments opposing Defendant Lucent's motion to dismiss his fourth cause of action for wrongful termination in violation of public policy prohibiting discrimination against disabled individuals or those *perceived* as disabled. First, he argues because he filed his motion to intervene within the statutory time period, his claim is saved. However, the mere act of filing his motion to intervene within the statutory time period does not dictate whether or not this cause of action is time

1 barred. The new complaint raises a new claim never before alleged in the litigation. For the first  
 2 time, Carrauddo now brings a claim for wrongful termination based on the policy prohibiting  
 3 *perceived* disability discrimination after the limitations period expired. Accordingly, that entire  
 4 cause of action must be dismissed as time barred. As to plaintiff's second argument to save his  
 5 claim, Mr. Carrauddo's wrongful termination claim based on the policy prohibiting perceived  
 6 disability discrimination seeks to enforce an independent right. In such a case, the claim does  
 7 not relate back to the filing of the original. The court should dismiss this claim from this case.

## 8 **II. LEGAL ARGUMENT**

### 9 **A. Carrauddo's Fourth Cause Of Action For Wrongful Termination In Violation** 10 **Of Public Policy Is Time Barred Despite The Filing Of His Application To** 11 **Intervene Prior To The Expiration Of The Statute Of Limitations**

12 In support of his theory that filing his motion to intervene within the statutory time period  
 13 was sufficient to avoid a statute of limitations defense, Mr. Carrauddo cites to one distinguishable  
 14 1938 case. *Alphonzo Bell Corp. v. Bell View Oil Syndicate, et al.*, 24 Cal.App.2d 587 (1938). In  
 15 *Alphonzo Bell*, owners of a tract of land sued owners of adjacent plots of land for improperly  
 16 extracting oil from its property. Another owner and his lessee contended that such oil was also  
 17 illegally being extracted from the adjacent property and moved to intervene as new parties before  
 18 the statute of limitations expired. Unlike the case at bar, the parties only requested to intervene  
 19 as new parties, they did not request to file another cause of action or claim against the  
 20 defendants. Distinct from this case, the issue in *Alphonzo Bell* was merely whether the new  
 21 parties joining the case at a late stage fell within the statute of limitations for the *existing* causes  
 22 of action brought against defendants in the case. The case did not address the issue of whether a  
 23 new claim could be added after the statute of limitations had passed. *See Anderson v. Barton*  
 24 *Mem. Hosp., Inc.*, 166 Cal. App. 3d 678, 684 (1985) (a complaint in intervention filed after the  
 25 statute of limitations expired could not survive where it alleges new claims that ultimately might  
 26 have required investigation into new or different issues)

27 It is beyond dispute that "[a] complaint in intervention, like any other complaint, is  
 28 ordinarily subject to the statute of limitations, *i.e.*, if it asserts a new cause of action from that  
 already before the court, it must be filed within the applicable statutory period." *See Rylaarsdam*

1 & Turner, *California Practice Guide, Civil Procedure Before Trial, Statute of Limitations* §  
 2 8:275 (The Rutter Group 2007);

3 Here, Mr. Carauddo did not only seek to intervene as a party, but chose to add the new  
 4 claims including wrongful termination in violation of public policy. In the Complaint in  
 5 Intervention, Mr. Carauddo's wrongful termination claim alleges the violation of two separate on  
 6 the public policies set forth in California Government Code § 12940 *et seq.* Mr. Carauddo  
 7 specifically alleges: "Defendants terminated Carauddo on account of his having a disability or  
 8 their *perception* that he had a disability." (Complaint in Intervention at 8:20-23.) Mr. Carauddo  
 9 has employed a tactic used by some plaintiffs in current litigation alleging two separate claims in  
 10 one cause of action.

11 The DFEH originally alleged a FEHA claim based only on "known disabilities." (*See*  
 12 DFEH Compliant at p. 7:13). Nowhere does the DFEH allege a "perceived" disability claim.

13 Claims for terminating on the basis of a disability and terminating on the basis of  
 14 perceived disability are two different claims under two different statutory sections with two  
 15 different policies at issue. The public policies are stated separately. Cal. Gov. Code  
 16 § 12926(k)(3) (having a record or history of disease, ... condition... which is known to the  
 17 employer) and § 12926 (k)(4) (being regarded or treated by the employer ... as having ... any  
 18 physical condition that makes achievement of a major life activity difficult). Cases interpret the  
 19 claims separately. *Jensen v. Wells Fargo Bank*, 85 Cal.App.4th 245, 257-60 (2000) (disability  
 20 discrimination claim different than regarded as disabled discrimination claim); *Jackson v.*  
 21 *County of L.A.*, 60 Cal.App.4th 171, 180 (1997) (disparate treatment based on a known  
 22 disability is a distinct theory from disparate treatment based on a perceived disability theory).

23 Wrongful termination claims citing different public policies result in different types of  
 24 claims which Lucent was not put on notice of at the inception of the DFEH's lawsuit. *See Gantt*  
 25 *v. Sentry Ins.*, 1 Cal.4th 1083, 1095 (1992) (the public policy in question in a wrongful  
 26 termination claim must be rooted in the policies delineated in a specific statutory provision);  
 27 *Sequoia Ins. Co. v. Sup. Ct. (Norden)*, 13 Cal.App.4th 1472, 1480 (1993) (the statute must  
 28 sufficiently describe the type of prohibited conduct to enable an employer to know the

1 fundamental public policies that are expressed in the law). Thus, Mr. Carauddo's new  
 2 Complaint in Intervention alleges a claim for "perceived" disability; the DFEH Complaint did  
 3 not.

4 Accordingly, while Mr. Carauddo's wrongful termination in violation based on disability  
 5 is similar to the DFEH's statutory disability claim, Mr. Carauddo's new claim based on  
 6 perceived disability is not. Lucent now faces an additional claim never before alleged in the  
 7 litigation. No reason exists to permit its filing after the limitations period expired. The claim  
 8 could have been timely filed and subsequently consolidated with this case. Mr. Carauddo chose  
 9 not to do so and should not be able circumvent the statute. The claim brings up new issues in the  
 10 case and is therefore time barred.

11 **B. Carauddo's Complaint in Intervention Does Not "Relate Back" to the**  
 12 **DFEH's Complaint**

13 Alternatively Plaintiff argues that the relation-back doctrine rescues his stale claim. The  
 14 doctrine does not, however, carry the day because it does not apply where the plaintiff seeks to  
 15 enforce an independent right. As shown above, Mr. Carauddo's new cause of action for  
 16 wrongful termination based on the policy prohibiting perceived disability discrimination seeks to  
 17 enforce a different legal liability against Lucent and therefore does not relate back to the filing of  
 18 the DFEH's complaint.

19 In arguing the relation back doctrine applies, Mr. Carauddo omitted the following  
 20 sentence from his quote of *Quiroz v. Seventh Ave. Center* 140 Cal.App.4th 1256, 1278 (2006):  
 21 "In addition, 'a new plaintiff *cannot* be joined after the statute of limitations has run where he or  
 22 she seeks to enforce an *independent right* or to impose greater liability upon the defendant.'  
 23 (Weil & Brown, *Cal. Practice Guide: Civil Procedure Before Trial* (The Rutter Group 2005) ¶  
 24 6:787, pp. 6-157-6-158.)" (emphasis in original) The court in *Bartalo v. Superior Court*, 51  
 25 Cal.App.3d 526, 533 (1975) applied the analysis provided by the California Supreme Court in  
 26 *Austin v. Massachusetts Bonding & Insurance Co.*, 56 Cal.2d 596 (1961) "Some early cases held  
 27 that an amendment stating any new cause of action could not relate back and that a plaintiff  
 28 could not amend so as to change the legal theory of his action [Citations]. Subsequent cases held

1 that a mere change in legal theory would not prevent an amendment from relating back but that  
 2 an amendment would not relate back if it set forth 'a wholly different cause of action,' i.e., 'a  
 3 wholly different legal liability or obligation.' [Citations.]”

4 First, as set forth above, Mr. Caruaddo alleges a new and different cause of action for  
 5 wrongful termination claim based on perceived disability. As shown above, that claim is a  
 6 wholly different legal theory from wrongful termination based on a known disability. Cal. Gov.  
 7 Code §§ 12926(k)(3) (having a record or history of disease, ... condition... which is known to  
 8 the employer) and 12926 (k)(4) (being regarded or treated by the employer ... as having ... any  
 9 physical condition that makes achievement of a major life activity difficult). *Jensen, supra*, 85  
 10 Cal.App.4th at 257-260; *Jackson, supra*, 60 Cal. App.4th at 180. In fact, in a recent California  
 11 Supreme Court decision, the court held that in a known disability discrimination case, it is now  
 12 settled that a plaintiff bears the burden of proof that he was qualified to perform the essential  
 13 functions of the job, with or without reasonable accommodation and the defendant does not have  
 14 to affirmatively prove that the plaintiff was *not* qualified in order to avoid liability. *See Green v.*  
 15 *State of California*, 42 Cal.4th 254 (2007). This is clearly distinct from a perceived disability  
 16 case, where the burden remains with the defendant. Accordingly, a wrongful termination claim  
 17 based on a policy prohibiting perceived disability discrimination requires a defendant to present  
 18 an entirely different defense than that of wrongful termination claim based on a policy  
 19 prohibiting known disability discrimination.

20 Second, Mr. Caruaddo concedes that the FEHA claim brought by the DFEH has different  
 21 interests at stake than his own. In his reply brief in support of his motion to intervene, Mr.  
 22 Caruaddo reminds us that in creating the DFEH, the Legislature’s “aim was not so much to  
 23 redress each discrete instance of individual discrimination so as to eliminate the egregious and  
 24 continued discriminatory practices of economically powerful organizations.” (Caruaddo’s Reply  
 25 in support of Motion to Intervene at p. 4:16-20, *citing Jennings v. Marralle*, 8 Cal. 4th 121, 134  
 26 (1994).) As a result, the “Department is the plaintiff and the employee only a witness.”  
 27 (Caruaddo’s Reply in support of Motion to Intervene at p. 4:20-2, *citing Peralta Community*  
 28 *College Dist. v. Fair Employment and Housing Commissions*, 52 Cal. 3d 40, 54 (1990).) Mr.

1 Carauddo emphasizes that the DFEH is expected to litigate in order to further the societal goal of  
2 ending discrimination, *without regard* to Mr. Carauddo's personal recovery. (Reply Brief at p.  
3 4:23-5:6, emphasis added).

4 Additionally, in his moving papers in support of his motion to intervene, Mr. Carauddo  
5 states "[t]he DFEH is charged with considering the interests of all employees in the state of  
6 California in determining (among other things) its settlement posture and its aggressive pursuit  
7 of the matter. Potential conflicts may arise between the DFEH's obligations as a representative  
8 of the State of California, and the interests of Carauddo." (See Carauddo's Motion to Intervene  
9 at p.4:19-22.)

10 These potential conflicts include the different damages sought by Mr. Carauddo and the  
11 DFEH under the FEHA. Mr. Carauddo is seeking lost wages, emotional distress and punitive  
12 damages under his wrongful termination cause of action. While the FEHA also permits the  
13 pursuit of such damages, the DFEH is seeking injunctive relief of enforcement of various FEHA  
14 statutes which includes requests for Lucent to (1) "cease and desist" from discriminating against  
15 employees based on disabilities; (2) implement new policies; (3) make reasonable  
16 accommodations and engage in the interactive process with all employees with disabilities;  
17 (4) conduct additional training sessions for their employees; and (5) ensure certain notices or  
18 posters are available to their employees. (DFEH Complaint at pp. 7:1-7, 8:3-9, 10:12-18, 11:3-  
19 16; Cal. Gov. Code §12965(c)(3).) Mr. Carauddo's remedies and interests are distinct from  
20 those of the DFEH and accordingly, the relation back doctrine should not apply.

21 Finally, California's relation back doctrine is traditionally applied in situations where an  
22 existing party in a lawsuit seeks to amend its complaint to include new causes of action after the  
23 statute of limitations has run. It makes little sense to apply this doctrine in this case because the  
24 DFEH could have never brought a wrongful termination claim in violation of public policy  
25 against Lucent. Only a private party bringing a private lawsuit can bring a wrongful termination  
26 claim. Since the DFEH could have never brought such a claim against Lucent, another party  
27  
28

1 should not now be permitted to bring that claim and somehow relate it back to the DFEH's initial  
2 complaint.<sup>1</sup>

3 **C. Carauddo Has No Excuse for Delaying The Filing of His Wrongful**  
4 **Termination in Violation of Public Policy Claim**

5 Mr. Carauddo had two years to file a common law cause of action for wrongful  
6 termination. Since the claim is not statutory, he was faced with no requirement to exhaust  
7 administrative remedies for this cause of action. Accordingly, he did not need to wait for the  
8 DFEH to complete its investigation of his FEHA claim or to commence a lawsuit on his behalf.  
9 In fact, even following the commencement of the DFEH's lawsuit, Mr. Carauddo and his  
10 attorneys still chose to wait. The DFEH filed their complaint against Lucent in July of 2007;  
11 Carauddo did not file his Motion to Intervene until late November 2007 and did not file his  
12 complaint until February 20, 2008 – weeks after the Court issued its Order on that motion. At  
13 any point in time, Mr. Carauddo was free and able to file his wrongful termination claim in his  
14 own lawsuit. Moreover, as set forth above, even if it wanted to, the DFEH could not have even  
15 investigated a common law wrongful termination claim on Mr. Carauddo's behalf.

16 **D. Carauddo's Work on this Wrongful Termination Claim Should be Deemed**  
17 **Duplicative**

18 In his opposition to this motion, Mr. Carauddo makes the argument that the facts,  
19 damages sought and law are all the same and accordingly, his wrongful termination cause of  
20 action is essentially the same claim as the DFEH's previously asserted FEHA claims. If that is  
21 the case, then all work generated by his personal attorneys to pursue this wrongful termination  
22 claim must be deemed duplicative. This court ordered limits on their participation in this  
23 litigation. Specifically, no "duplicative motions or oppositions to motions" to those claims  
24 asserted by the DFEH. (Order on Motion to Intervene at p.3:13-21.) Second, "no discovery  
25 propounded by Carauddo's counsel that duplicates discovery propounded by the DFEH." *Id.*  
26 Accordingly, if these claims are in fact essentially the same, as Mr. Carauddo now contends,  
27

28 <sup>1</sup> Lucent objects to Plaintiff's reliance on an unpublished opinion. EEOC v. Avecia Inc. 2003 U. S. Dist LEXIS 19325 (D. Del. 2003)



1 Lucent should not be required to respond to any discovery propounded by Mr. Carauddo or  
2 respond to any motions filed by Mr. Carauddo that relate in any way to this wrongful termination  
3 in violation of public policy cause of action.

4 **III. CONCLUSION**

5 Lucent respectfully requests that the Court grant its motion to dismiss Carauddo's  
6 wrongful termination in violation of public policy claim. At the minimum the wrongful  
7 termination claim on the basis of perceived disability should be stricken; specifically strike  
8 "and/or was regarded by Lucent as having such limitations" (Complaint in Intervention ¶¶ 28,  
9 44) and "or because the employee is perceived as having a disability." *Id.* at ¶ 52.  
10 Alternatively, if the court determines that the wrongful termination claims should remain in the  
11 case, Lucent requests that this court order that any work initiated on this cause of action be  
12 deemed duplicative.

13 DATED: April 2, 2008

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